**Attorney General**
**Betty D. Montgomery**

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VIA OVERNIGHT DELIVERY
Magalie Roman Salas
Secretary
Federal Communications Commission
Portals II Building
Room TWA325
445 12th Street, S.W.
Washington, D.C. 20554

Re: *In the Matter of Calling Party Pay Service Option in the Commercial Mobile Radio Services,* WT Docket No. 97-207.

Dear Ms. Salas:

Enclosed please find the original and ten (10) copies of the Reply Memroandum in Support of the Petition for Reconsideration and Clarification submitted by the Public Utilities Commission of Ohio in the above referenced docket. This document will also be submitted through the FCC's electronic comment filing system. Please time stamp and return one copy to me in the enclosed self-addressed stamped return envelope.

Thank you for your attention to this matter.

Respectfully submitted,

**Steven T. Nourse**
Assistant Attorney General
Public Utilities Section
180 E. Broad St., 7th Floor
Columbus, OH 43215
(614) 466-4396
Fax: (614) 644-8764

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**Before the**

**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**



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| In the Matter of | ) | |
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| Calling Party Pay Service Option in the Commercial Mobile Radio Services | ) | WT Docket No. 97-207 |

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# REPLY MEMORANDUM IN SUPPORT OF THE PETITION FOR RECONSIDERATION AND CLARIFICATION SUBMITTED BY THE PUBLIC UTILITIES COMMISSION OF OHIO

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**Betty D. Montgomery**
Attorney General

**Steven T. Nourse**
Assistant Attorney General
Public Utilities Section
180 E. Broad St.
Columbus, OH 43215
(614) 466-4395
Fax: (614) 644-8764

**Counsel on behalf of**
**The Public Utilities Commission of Ohio**

**Before the**

**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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## BACKGROUND

On July 7, 1999, the Federal Communications Commission ("FCC") issued a combined order containing both a Declaratory Ruling ("Ruling") and Notice of Proposed Rulemaking ("NPRM") (the July 7, 1999 order as a whole will be referred to as the "*CPP Order*"). On August 16, 1999, the Public Utilities Commission of Ohio ("Ohio Commission") filed a Petition for Clarification and Reconsideration ("Petition") regarding the jurisdictional issues raised and partially resolved in the *CPP Order*. Notice of the Ohio Commission's Petition was not published in the Federal Register until September 17, 1999, setting the schedule for opposition and reply comments on the Petition as October 4 and October 14, respectively. The following parties filed oppositions to the Ohio Commission's Petition: Cellular Telecommunications Industry Association (CTIA), Personal Communications Industry Association (PCIA), AT&T, GTE

and America One Communications. The California Public Utilities Commission filed a memorandum supporting the Ohio Commission's Petition.

The Ohio Commission hereby submits this reply memorandum in support of its Petition for Clarification and Reconsideration.[1]

## ARGUMENT

### I. The Ohio Commission's Petition was properly filed and was necessary to preserve the jurisdictional issues for appeal in the context of reviewing the entire NPRM.

Some of the opposing parties criticize the Ohio Commission for filing its Petition. CTIA claims that the Ohio Commission committed "procedural error" and has "jumped the gun," to the extent the Ohio Petition seeks clarification of jurisdictional issues beyond those decided in the Ruling. CTIA Opposition at 8-9. Moreover, CTIA argues that the Ohio Commission did not need to file the Petition to protect its ability to appeal any final decision regarding CPP jurisdictional issues. *Id. See also* GTE Opposition at 2 (note 4). These arguments distort the express purpose and effect of the Ohio Petition.

The Ohio Commission candidly stated its intentions and the purposes for filing the Petition. As was thoroughly elaborated in Ohio's Petition:

> The Ohio Commission has several purposes in filing this Petition for Reconsideration and Clarification. Of course, the Ohio Commission is interested in clarifying the important jurisdictional issues presented by CPP and filed this Petition, in part, to preserve its right to pursue the jurisdictional issues on appeal, if necessary. Because the FCC released the jurisdictional conclusion in the Ruling prior to the NPRM being finalized, some of the jurisdictional issues

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[1] The Ohio Commission notes that, due in part to the delay in Federal Register publication, the parties opposing the Petition have had *in excess of six weeks* to formulate their oppositions and prepare the filings. By contrast, the Ohio Commission has only 10 days to respond — a limited time period that is largely consumed by mail service of the oppositions and a three-day holiday weekend. Given that the Ohio Commission had to review the 50+ pages of opposition arguments and formulate a reply memorandum within a few business days, it must be stressed that Ohio disputes all of the arguments made by the opposing parties, unless otherwise expressly noted in this memorandum.

> have been placed on a different procedural track while others remain to be resolved as part of the NPRM. In particular, the Ohio Commission recognizes that the Ruling does not dispose of all the pertinent jurisdictional issues as discussed in the NPRM, although Ohio believes that the jurisdictional issues are inextricably intertwined.
>
> As a result of the FCC's procedural approach, the Ohio Commission largely addresses the jurisdictional issues in this Petition as one set of issues (including both the issues raised in the Ruling and those raised in the NPRM). In that regard, and given that this filing is made prior to the deadline for filing comments in this docket, the jurisdictional comments relating to the NPRM made herein should also be considered as a supplemental NPRM comments by the Ohio Commission.
>
> Another reason for the Ohio Commission filing this Petition is to ensure that the FCC will seriously consider the substantive recommendations contained in the Ohio Commission's comments in this docket, in light of the jurisdictional concerns being advanced in this Petition. The Ohio Commission does share the FCC's apparent view that CMRS should generally be subject to little regulation, and the Ohio Commission could generally endorse a similar approach to CPP as is being considered in the NPRM (subject to the recommendations made in the Ohio Commission's comments). Even so, it is important that the FCC properly determines that CPP is within the jurisdiction of State commissions.

Ohio Petition at 3-4. CTIA and GTE apparently chose to ignore this explanation and second-guess Ohio's motivation for exercising its procedural right.

Frankly, the Ohio Commission would prefer to avoid precipitous litigation with the FCC and views that option as a last resort. If the Petition was not filed, the Ohio Commission would have needed to pursue an appeal on the issues addressed in the Ruling well before the related issues are resolve in the NPRM. Further, as a regulatory agency faced with resolving similar controversial disputes, the Ohio Commission generally believes it is good practice to pursue reconsideration prior to filing an appeal so as to better define the issues and ensure that the decision-maker is fully informed of the implications stemming from its decision. Thus, because the FCC carved out the threshold jurisdictional issue of classifying CPP as a CMRS service, thereby placing that

issue on a separate procedural track than the related issues to be addressed in the NPRM, the Ohio Commission filed its Petition in an attempt to keep both issues on the same procedural path and avoid litigation that may ultimately be unnecessary.

PCIA also criticizes the Ohio Petition by claiming that it "merely re-circulates old propositions." PCIA Opposition at 2. Similarly, the opposing parties repeatedly argue that the *CPP Order* has already considered and rejected the arguments contained in Ohio's Petition. PCIA Opposition at 8; GTE Opposition at 6; America One Opposition at 2. As a threshold matter, it is simply not true that the *CPP Order* considered and rejected all of the issues raised in Ohio's Petition. Ohio's argument that 47 C.F.R. 20.3 is violated by the *CPP Order* was not considered by the FCC. The other critical issue that the opposing parties now first address in detail (that was not seriously considered by the *CPP Order*) is whether the consumer regulations of the type being considered in the NPRM amount to "rate regulation."[2]

Even if the Ohio Petition does address certain matters already rejected in the *CPP Order*, the inherent purpose of the **re**-consideration process is to re-examine conclusions previously reached. Thus, the opposing parties' criticisms of Ohio's Petition are without merit and should be disregarded. As a related matter, the opposing parties' reliance on the *CPP Order* as sole authority for arguments being made is virtually meaningless in this context, and should be dismissed as "bootstrapping" arguments. Instead, the Ohio

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[2] As the Ohio Commission maintained in its Petition, the FCC should refrain from addressing two topics that are not adequately addressed by the record in this docket: (1) whether a particular State regulation is "rate regulation" under 47 U.S.C. § 332, and (2) whether the so-called "CPP-like" services are encompassed by any of the regulations being promulgated as a result of the current NPRM. There are many questions regarding the characterization of particular State regulations as "rate regulation" and the proper classification of CPP-like services that cannot be addressed in this docket (absent additional information and another round of comments). Attempting to address such undefined topics would raise due process issues and could unnecessarily compound the jurisdictional issues being disputed. At a minimum, the FCC should simply decline to embrace any blanket preemption approach regarding CPP and only address actual conflicts when, and if, they ever arise.

Commission respectfully urges the FCC to re-think the *CPP Order* and seriously consider whether the conclusions reached therein should be modified.

## II. The Declaratory Ruling improperly concludes that CPP is a CMRS service.

As the Ohio Commission demonstrated in its Petition, CPP does not meet the "interconnected service" criteria for being a CMRS service because CPP does not "give subscribers the capability to communicate to *or receive communications from all other users on the public switched network,*" as required by 47 C.F.R. 20.3. This is true because CPP customers cannot receive *any* call from *any* person on the public switched telephone network (PSTN), unless the caller affirmatively establishes a contractual relationship with the CPP customer's CMRS provider. As such, neither the CMRS provider nor the CPP customer has any control over whether a call is received from a user of the PSTN. Only the calling party can choose whether to allow a CPP customer to receive a call from the PSTN. Until that happens, the CPP customer is simply not interconnected with the PSTN.

Predictably, the opposing parties took issue with the conclusion drawn from these undisputed facts. CTIA argues that Rule 20.3 merely requires a latent technical capability to receive calls. CTIA Opposition at 6-7. *See also* GTE Opposition at 8 (underlying ability to enable CPP customer to receive calls is enough). But even GTE admits as "fact" that (1) a CPP customer cannot receive CPP calls unless the caller agrees to pay the charges, and (2) a CPP caller has limited call placement availability. GTE Opposition at 7. GTE's admission that CPP customers cannot receive CPP calls unless the caller agrees to pay the charges, in and of itself, serves to defeat classification of CPP as a CMRS service under Rule 20.3.

In any case, the argument that Rule 20.3 requires only a latent and conditional capability for interconnection with the PSTN, a capability that can only be triggered by events beyond the customer's or service provider's control, is an unreasonable stretch of Rule 20.3's text. CTIA and GTE are attempting to insert a new concept into the rule that significantly alters the meaning. Classification of CPP as a CMRS service violates Rule 20.3.

GTE also argues that the technological composition of the underlying CMRS service does not change simply because the calling party pays for the call, noting that the underlying CMRS service is considered to be interconnected under Rule 20.3. GTE Opposition at 7. This line of argument does expose the fact that CPP is not really a new service, but is merely a new billing option —since the "underlying" service is the same. The argument does not advance GTE's cause, though. If one accepts the notion (which the Ohio Commission does not) that CPP is a new CMRS service and not merely a billing option, then it follows that the nature of the "underlying" service (*i.e.*, the traditional cellular service) is irrelevant. Instead, the relevant issue to examine is the nature of CPP service itself, separate and apart from any "underlying" service.

Because, as GTE admits and is otherwise undisputed, a CPP customer cannot receive calls without an entirely separate contractual relationship being formed between the caller and the CPP customer's CMRS provider, the "service" cannot fit within Rule 20.3. In an attempt to shift the issue and salvage its argument, PCIA argues that CPP customers need not be able to receive calls since they can place outgoing calls. PCIA Opposition at 14. PCIA maintains that the Ohio Petition suggests that one-way communications services, including one-way paging, are not CMRS services. *Id.* This

argument not only incorrectly characterizes Ohio's argument, but it is also fundamentally misguided.

According to the *CPP Order*, CPP is a CMRS service that allows customers to receive calls without charge because the calling party pays for the call. Ohio does not dispute that one-way services can be properly classified as CMRS services under Rule 20.3 if they are connected to the public switched telephone network (PSTN). Instead, the Ohio Petition argues that Rule 20.3 is not met for CPP (a one-way service designed for CMRS customers to *receive calls*) because CPP customers are not able to receive calls absent the calling party unilaterally deciding to become a customer of the CMRS provider. The fact that CPP customers also subscribe to some *other* service enabling the customer to place outgoing calls is not relevant for purposes of classifying CPP as a separate CMRS service.

In a last ditch attempt to salvage its argument, PCIA even suggests that the provision of a notification message (an issue still pending in the NPRM) also requires interconnection with the ILEC network. PCIA Opposition at 14. However, Rule 20.3 requires that the customer of the particular CMRS service be interconnected with the PSTN in order to communicate to or receive communication from "other users" —not a notification message from the CMRS provider. 47 C.F.R. § 20.3 (1999). PCIA's argument that the notification message serves to satisfy the requirement for interconnection with the PSTN is completely lacking.

AT&T and America One also argue that 800/900 services are analogous to CPP, and that those services demonstrate that CPP is properly classified as a CMRS service under Rule 20.3. AT&T Opposition at 2-3; America One Opposition at 3. These analogies are easily distinguished. CPP must satisfy the definition of a CMRS service in

Rule 20.3, whereas wireline long distance services simply do not —that is the relevant determination reached in the *CPP Order* that is being challenged by Ohio's Petition. Further, unlike interstate wireline services, Congress carved out a significant role for States in the regulation of CMRS by enacting 47 U.S.C. § 332. To the obvious chagrin of the opposing parties, the FCC cannot ignore Section 332 or attempt to re-write the shared regulatory jurisdictional model Congress crafted in that section.

The Ohio Commission also notes that 800/900 services operate under a specially-designated area code, which serves to alert customers that separate charges might apply. The Ohio Commission recently filed an Emergency Petition for Additional Delegated Authority to Implement Number Conservation Measures, on September 13, 1999, in CC Docket No. 96-98 and NSD File No. L-97-42. (A copy of Ohio's Petition is attached to this memorandum.) One of the requested relief measures was to implement technology-specific overlays. In this regard, the Ohio Commission submits that separate numbering overlays for cellular services (including CPP "service") could significantly enhance the customer notice issues presented in this CPP docket, while simultaneously meeting the Ohio Commission's urgent need to address numbering exhaust. In other words, having a unique dialing pattern for cellular and/or CPP calls would serve two beneficial and complimentary functions: (1) it would condition the calling party to remember that additional charges may apply, and (2) would serve as a valuable tool for number conservation.

In any case, the opposing parties have not refuted the basic arguments advanced in Ohio's Petition challenging the FCC's classification of CPP as a CMRS service. As long as the CMRS customer remains a CPP subscriber, that customer cannot receive calls from the PSTN unless a caller also "becomes" a customer of the same CMRS

provider. Of course, if the caller refuses to become a customer of that CMRS provider, then the CPP customer is unable to receive a call from the PSTN and is only connected to other customers of the same CMRS provider. Becoming connected to receive a call from the PSTN is beyond the control of a CMRS provider or a CMRS customer who has opted for CPP — it depends entirely on the caller. This situation is unlike any other service and it fails to meet the definitional requirement of Rule 20.3.

The FCC should acknowledge that CPP is not really a new CMRS service, but is merely a billing option.

## III. Even assuming that CPP is properly classified as a CMRS service, the FCC lacks authority to impose mandatory uniform national rules regarding CPP because the FCC and State commissions clearly have concurrent jurisdiction over the consumer issues discussed in the NPRM.

### A. Section 2(b) of the Communications Act, 47 U.S.C. § 152(b), does not provide a basis for preemption of State regulations over CPP and that statute is generally inapplicable to CMRS services.

Congress enacted Section 332 as part of the Omnibus Budget Reconciliation Act of 1993 (OBRA). Section 332 preempts State regulation over the "entry of or the rates charged by" CMRS providers. State commissions cannot regulate CMRS rates directly or restrict entry of new providers into the CMRS market. Although the Ohio Commission disagrees with the conclusion that CPP is properly classified as a CMRS service (as discussed above), that conclusion does not resolve the potential jurisdictional conflict that has been staged by the *CPP Order*. The Ohio Petition demonstrated, consistent with the FCC's own past rulings in this regard, that the consumer regulations being contemplated in the NPRM do not amount to "rate regulation" under Section 332. Those arguments were largely unrefuted by the opposing parties, and they need not be repeated here in order for the FCC to address them. Instead, the Ohio

Commission will briefly respond to the new arguments presented by the opposing parties.

PCIA presents a misguided, albeit novel, proposition that the FCC is able to broadly preempt State commission regulations relating to CMRS services —even beyond the express preemption provisions of Section 332. In particular, PCIA argues that 47 U.S.C. § 152 provides an *independent* basis to preempt State commission regulations relating to CMRS, based on the interstate nature of CMRS services. PCIA Opposition at 3-5. In other words, PCIA boldly maintains that the FCC can effectively ignore Congress' express reservation of State authority over non-rate CMRS matters. This argument is completely untenable.[3]

In 1990, when Congress created Section 332 (47 U.S.C. § 332), it also amended Section 2 of the Communications Act (47 U.S.C. § 152) through the enactment of OBRA. The amendment to 47 U.S.C. § 152 was to cross-reference the newly-created 47 U.S.C. § 332, and clearly indicates that Section 332 is an exception to the interstate/intrastate jurisdictional dichotomy otherwise applicable to telecommunications services. Amendment of 47 U.S.C. § 152 was also needed in order to convey FCC jurisdiction over CMRS rate and entry matters, both intrastate and interstate alike. Notwithstanding CTIA's argument, the FCC cannot "ratchet down" both statutes and broadly preempt State CMRS regulations to the point that non-rate and non-entry regulations are invalidated. In making this circular argument, CTIA loses sight of the

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[3] CTIA appears to implicitly advance a similar claim by encouraging the FCC to rely upon Section 152(b). CTIA Opposition at 12-13. In this regard, CTIA sweepingly and prematurely assumes that compliance with both FCC regulations regarding notice and those of State commissions would be impracticable. In the process of making this argument, CTIA also attempts to rewrite the well-established "impossibility" standard that is normally applicable to Section 152(b) preemption by the FCC into a standard of "impracticability." CTIA's approach is equally unavailing, even if Section 152(b) applied to CMRS services (which it does not).

obvious flaw: relying on the general preemption statute is directly contrary to Congress' specific reservation of State authority.

As demonstrated in the Ohio Commission's Petition, Section 332 creates a distinct regulatory structure for CMRS services, whereby States are expressly preempted from regulating rates or market entry but retain jurisdiction to regulate other terms and conditions of CMRS services. Under the structure of Section 332, the FCC retains control over rate regulation of local CMRS service (that would otherwise lie with State commissions, absent Section 332). PCIA's argument that the FCC can use Section 152(b) to circumvent Section 332 is a thinly-veiled attempt to unilaterally repeal Congress' express reservation of State authority in Section 332. Section 152(b) is not applicable to CMRS services. Not only does that argument lack a plausible statutory basis, but it also violates the cardinal rule of statutory construction by ignoring the plain text and directly violating the express intentions of Congress. *See Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95 (1983) (the primary task in determining whether a federal law preempts a State law is to ascertain Congress' intent in enacting the federal statute at issue); *Allison Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985) (the purpose of Congress is the ultimate touchstone).

In short, relying on Section 152(b) as a source for preempting CPP regulations of State commissions would be patently erroneous as a matter of law.

### B. The consumer regulations being contemplated in the NPRM do not amount to "rate regulation" under Section 332 and the FCC cannot preempt State commissions from implementing such regulations.

Unless consumer regulations like those contemplated by the FCC in the *CPP Order* can be properly characterized as "rate regulation," State regulation cannot be preempted by Section 332. Concluding that the CPP consumer issues amount to rate

regulation is inconsistent with Section 332 and its legislative history. Doing so also violates the well-established principle that the beginning point is a presumption against Federal preemption, particularly in areas of historic State authority such as public utility regulation. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). As previously stated, the Ohio Commission also maintains that the FCC lacks a proper basis in this record to pre-judge any particular State regulation regarding CPP as "rate regulation."

CTIA suggests that "it is hard to square the Ohio Commission's argument that 'the CPP consumer issues at issue in this docket do not even have an indirect impact on rates' because they involve 'consumer notification and billing issues' with [the Ohio Commission's] conclusion that 'CPP directly affects the rates paid by landline customers for calls that are local in nature.' " CTIA Opposition at 12. This illusory "cut-and-paste" inconsistency manufactured by CTIA fails to acknowledge the two distinct points that were being made in separate portions of Ohio's Petition that happen to also be alternative arguments. It cannot be reasonably disputed that the proposed CPP "service" would uniquely affect wireline customers by imposing a new charge on the same call where a charge previously did not exist. Rather than responding to that new charge through an attempt at rate regulation, however, the FCC and State commissions alike have an interest in promulgating reasonable, well-balanced regulations that fairly protect consumers while permitting the proposed service to be offered. Concluding that the consumer regulations being contemplated do not amount to rate regulation is entirely consistent with the simple fact that wireline customers would be uniquely affected by CPP.

Along a similar vein, CTIA concludes without citation or basis that "[r]egulators are concerned that callers will be charged excessive prices to complete calls to CMRS

subscribers." CTIA Opposition at 16. CTIA concludes, therefore, that the resulting regulations must be "rate regulation" and the "concern over the charges associated with CPP calls is the undoing of their jurisdictional argument." *Id.* Hence, in one fell swoop, CTIA ascribes —as if by mental telepathy— the motivations for all regulators to regulate CPP (sounds more like a guilty conscience speaking) and summarily predicts that all resulting regulations amount to rate regulation. Of course, this "catch-all" approach to preemption cannot be reasonably defended or upheld.

CTIA and PCIA also argue that any non-uniform CPP regulations, by and among the various States, amounts to rate regulation. For example, CTIA argues that, if a State adopts a CPP regulation different from the FCC, it would impair a carrier's ability to offer efficient, cost-effective CPP service or could even totally bar a carrier's ability to offer CPP in that State. CTIA Opposition at 12. Similarly, PCIA argues that the FCC must remove the impediments to CPP viability (namely, State regulations), in order for CPP to be provided "for profit." PCIA Opposition at 9. These claims are not only wildly speculative, but are unjustified and unreasonable.

Relying upon such a loose nexus between regulation and rates obliterates the distinction between rate regulation and non-rate regulation. It could be argued that all regulation has an effect, however indirect or remote, on rates. *See eg.* America One Opposition at 4-5 (consumer notification regulations could be so burdensome as to require carriers to increase their rates for CPP). Of course, in allowing States to retain authority over CMRS services, Congress understood that different States may impose different regulations. If the "logic" of the opposing parties is employed, one could quickly render completely meaningless Congress' express reservation of State

authority over CMRS services. Once again, that is the obvious effect of CTIA's argument.

This approach also plainly ignores the important distinction between federal statutes preempting State laws "regulating rates" (like § 332) and federal statutes preempting State laws "relating to rates," by improperly placing Section 332 in the latter category. *Morales v. Trans World Airlines, Inc.*, 119 L.Ed 2d 157, 168 (1992). Congress knows how to broadly preempt State when it wants to do so. In enacting Section 332, Congress chose to expressly preserve substantial State authority over CMRS services, as has been repeatedly recognized by the FCC in the past.

Unlike the other opposing parties, AT&T frankly acknowledges that "[o]f course, Section 332 gives the states the power to adopt general consumer protection rules. . ." AT&T Opposition at 4. Unfortunately, AT&T proceeds to conclude that the FCC to preempt such state regulations, improperly relying upon *AT&T v. Central Office Telephone, Inc.*, 118 S.Ct. 1956 (1998). CTIA also attempts to rely on the *Central Office Telephone* case, in support of its arguments. CTIA Opposition at 4. AT&T's and CTIA's reliance on this decision in the context of opposing Ohio's Petition is misplaced.

The *Central Office Telephone* decision involved application of the filed-rate doctrine, which is based on a particular statute, 47 U.S.C. § 203. The issue before the Court was "whether the federal filed-tariff requirements of the Communications Act pre-empt respondent's state-law claims." *Central Office Telephone*, 118 S.Ct. at 1960. In concluding that the state-law claims were preempted, the Court specifically found that the disputed matters were addressed in an FCC-approved tariff and were governed by that tariff. *Central Office Telephone*, 118 S.Ct. at 1964. By contrast, CPP rates will not be offered subject to an FCC-approved rate tariff. As Chief Justice Rehnquist made clear

in his concurring opinion, the filed rate doctrine need preempt "only those suits that seek to alter the terms and conditions provided for in the tariff." *Central Office Telephone*, 118 S.Ct. at 1966.

Significantly, the Court also made a critical determination that, allowing the state-law claims to proceed in that case, would "defeat the broad purpose of the statute" in question, being to avoid discrimination among a carrier's customers. *Central Office Telephone*, 118 S.Ct. at 1963. In short, the *Central Office Telephone* Court was simply enforcing the express statutory remedy created by Congress for a particular situation involving FCC-approved tariffs. *Central Office Telephone*, 118 S.Ct. at 1964 (respondent's remedy for discrimination regarding an interstate service is to bring an action under Section 202 of the Communications Act). Thus, any *general* cause of action, whether based on federal law or state law, would be precluded, because Congress created an exclusive remedy.

This rationale does not apply to the jurisdictional dispute regarding CPP, where Congress has created a particular division of jurisdiction as between the FCC and State commissions that is unique among all other provisions of the Communications Act. As demonstrated, it the arguments of the opposing parties, not the Ohio Commission, that seek to invalidate the express terms of the controlling statute. Consistent with the *Central Office Telephone* decision, it is evident that the Court would ensure that Congress' plan is implemented. As was concluded by the *Central Office Telephone* Court, "the [Communications Act] cannot be held to destroy itself." *Central Office Telephone*, 118 S.Ct. at 1965. In the case at bar, this principle mandates that the preemption theories of the opposing parties be rejected as an improper attempt to render Congress' reservation of State authority over CMRS a nullity.

## CONCLUSION

For the foregoing reasons, the Ohio Commission respectfully requests that the FCC reconsider and clarify the *CPP Order* consistent with the Ohio Commission's Petition for Clarification and Reconsideration.

Respectfully submitted,

**Betty D. Montgomery**
Attorney General

**Steven T. Nourse**
Assistant Attorney General
Public Utilities Section
180 E. Broad St.
Columbus, OH 43215
(614) 466-4395
Fax: (614) 644-8764

# ATTACHMENT

Before the
Federal Communications Commission
Washington, D.C. 20554

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| In the Matter of | ) | |
| | ) | |
| Petition for Declaratory Ruling and Request for Expedited Action on July 15, 1997 Order of the Pennsylvania Public Utility Commission Regarding Area Codes 412, 610, 215 and 717 | ) | NSD File No. L-97-42 |
| | ) | |
| Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 | ) | CC Docket No. 96-98 |

## PUBLIC UTILITIES COMMISSION OF OHIO EMERGENCY PETITION FOR ADDITIONAL DELEGATED AUTHORITY TO IMPLEMENT NUMBER CONSERVATION MEASURES

The Public Utilities Commission of Ohio (PUCO) submits to the Federal Communications Commission (FCC) this emergency petition for additional delegated authority pertaining to number conservation measures. Pursuant to paragraphs 30 and 31 of the FCC's September 28, 1998, Memorandum Opinion and Order and Order on Reconsideration in NSD File No. L-97-42,[1] the PUCO requests authority to implement various number conservation measures.

It is imperative that the FCC expeditiously grant Ohio the requested authority. Ohio is already in the relief planning stages for four prematurely exhausting area codes. If there is to be any hope of forestalling the existing area code exhausts, the requested tools must be made immediately available. Even if the pending exhausts cannot be

[1] Petition for Declaratory Ruling and Request for Expedited Action on July 15, 1997 Order of the Pennsylvania Public Utility Commission Regarding Area Codes 412, 610, 215 and 717.

forestalled, the requested authority must be available in order to prevent the premature exhaust of the soon to be assigned new area codes. The measures for which the PUCO seeks authority would conserve numbers, thereby slowing the pace of area code relief, without having anticompetitive consequences or favoring one segment of the industry over another. They would also help protect Ohio against the disruption as well as the economic and social costs of new area codes.

Specifically, the PUCO respectfully requests that the FCC grant it the authority to:

1. Enforce current standards for number allocation, or to set and enforce new standards and requirements.

2. Order the return of unused, improperly used, reserved, and/or protected NXX codes (and/or thousand blocks if number pooling is implemented).

3. Order efficient number use practices within NXX codes.

4. Investigate and order additional rationing measures.

5. Require number pooling where and when the state determines it to be appropriate.

6. Implement technology- and/or service-specific overlays[2]

## BACKGROUND

Since 1996, Ohio has gone from four area codes to eight codes. Ohio currently has four area codes in the relief planning stages. Two of these codes are less than four years old. In 1997 the PUCO opened an investigation into area code relief procedures and number administration. In that case, Case No. 97-884-TP-COI, the PUCO

[2] The PUCO staff conducted an extensive survey of business and residential customers in Ohio. See Attachment. This survey demonstrates an overwhelming acceptability of a technology- or service-specific overlay by customers with and without wireless service. The survey results would seem to clearly indicate that any claims of competitive disadvantages are without merit since most customers indicated that a wireless overlay would not be unacceptable.

determined that it would be appropriate to wait and see if the FCC's and the North American Numbering Council's (NANC) efforts brought about desired changes in Ohio before implementing Ohio specific requirements. Unfortunately, there has been no real developments on the federal front and we no longer believe it would be prudent to await those developments.

By acting right now the PUCO believes it may be able to forestall some of the pending exhaust. Granting the requested authority to the PUCO such that we can act immediately will certainly help to lengthen the lives of any new codes added in Ohio. If we are unable to act in the near term, our fear is that the new codes that will shortly be introduced will also exhaust prematurely.

One need only examine the change in the Central Office Code Utilization Survey forecast results between 1998 and 1999 to clearly understand that the current system is of little value. According to the 1998 results no Ohio codes should have been in relief planning stages at this time. The 1999 results indicated that one code (330) was already past the optimal advance planning stage and that 3 other codes (440, 419, and 513) needed to begin relief planning. The PUCO needs the tools to confront these problems before they escalate further out of control. It is widely recognized that it is at such early points that the implementation of number conservation efforts such as thousand block pooling can have the greatest impact. If the PUCO is granted the authority to implement number conservation methods, it will be able to help check the flow of a precious national resource, as well as save Ohio's citizens and telecommunications companies from the ordeal and expense of repeated area code relief measures.

## AUTHORITY REQUESTED

The PUCO requests the authority to investigate and undertake all or some of a variety of number conservation measures. These measures will conserve numbers

without anticompetitive consequences and without favoring one type of provider or technology over another. The PUCO is aware of and involved in efforts to develop national number conservation guidelines and does not wish to undermine those efforts. Further, the PUCO is mindful of the fact that any Ohio measures may have to be modified as national guidelines are developed. However, much of the authority that the PUCO seeks merely involves strict enforcement of existing industry guidelines. Additionally, as Ohio measures are developed, care will be taken to minimize differences with what is being considered on a national level so that if any modifications are necessary later they will be minimal. Finally, while agreeing that national guidelines in this area are optimal, the PUCO is keenly aware of the need to act quickly to avoid the escalation of area code difficulties already being experienced in Ohio, and the explosion of those which loom on the horizon. We are further of the opinion that states should have a strong role in numbering even when national guidelines are put in place.

Details concerning the number conservation methods that the PUCO requests authority to implement follow.

**(1) Authority to enforce current standards for number allocation or to set and enforce new standards and requirements. (2) Order the return of unused, improperly used, reserved, and/or protected NXX codes (and/or thousand blocks if number pooling is implemented).**

Although guidelines for the allocation of NXXs have been established, the code administrator (Lockheed Martin, the North American Numbering Plan Administrator) has little or no authority to enforce the requirements contained therein. The system was set up to be self-enforcing; companies were to certify that they meet certain

requirements, but no efforts were made to verify those representations. Although the code administrator has begun taking some steps in this direction, it still has little or no authority and no efficient enforcement system. The PUCO seeks authority, at a minimum, to enforce the standards already in the guidelines such as the requirement that the requesting company be certified to provide service in the area and that a forecasted need for the new NXX is demonstrated in a months-to-exhaust report. The PUCO seeks and would prefer the broader authority to set and enforce additional standards, such as a fill rate that must be met before a growth NXX can be granted and demonstration of readiness to provide service before an initial NXX can be granted. Such authority would allow the PUCO to order that an NXX be returned to the code or pooling administrator if the standards were not met.

Similarly, the PUCO seeks authority, at a minimum, to order the return of initial and growth NXXs if they are not activated in accordance with the existing guidelines. The PUCO seeks and would prefer the broader authority to set and enforce additional standards, such as requiring that in order for a company to retain a newly obtained NXX, it must not only be "activated" within six months but numbers must actually have been assigned to end users within that time.

Finally, the PUCO seeks authority to investigate and order the return of unused, improperly used, reserved, and/or protected NXX codes (and/or thousand blocks if number pooling is implemented) if it becomes necessary and can be done without causing disruption to network operations.

### (3) Authority to order efficient number use practices within NXX codes.

The PUCO seeks the authority to order sequential use of numbers within an NXX or thousand-block. This will help preserve blocks of numbers for eventual pooling, whether under an Ohio pooling measure or a national pooling plan.

### (4) Authority to investigate and order additional rationing measures.

The PUCO seeks authority to investigate and order number rationing if an area code nears a jeopardy situation. The PUCO would strive for consensus with and among the industry as to the rationing process, but this authority would allow rationing to be implemented sooner than under current guidelines in an attempt to help delay the need for area code relief.

### (5) Authority to require number pooling where and when the state determines it to be appropriate.

The PUCO seeks the authority to implement number pooling. The PUCO believes that number pooling can provide significant benefits in certain situations. Although only available in exchanges where local number portability (LNP) has been deployed, these are also often the exchanges where competition has developed and increased the need for NXX assignments for that exchange. The PUCO needs the authority to implement number pooling in those areas where number pooling passes an appropriate benefit/cost analysis.

### (6) Authority to implement technology- and/or technology-specific overlays.

The PUCO seeks the authority to implement service-specific and technology-specific NPA overlays where such overlays are found to be in the public interest. The PUCO continues to believe that the prohibition on service- and technology-specific overlays serves only to harm the public interest. The PUCO understands the arguments that service- and/or technology-specific overlays may place certain carriers or technologies at a competitive disadvantage. The PUCO believes there is no evidence to support these arguments. In fact, we recently conducted an extensive survey of residential and business telecommunications customers. The survey included customers with and without wireless telephone service. The responses to the survey show an overwhelming willingness (by customers with and without wireless service) to accept wireless only overlays. Certainly, if the existing and potential customer base of the wireless industry finds a wireless overlay acceptable, then it follows that the existing and potential customer base would not be lead to discontinue wireless service or not subscribe to new wireless service by the existence of a wireless only overlay.

In addition to a wireless only overlays, service-specific or technology-specific overlays could be used to place all lines without public telephone number associations such as point-of-sale terminals, remote automatic teller machines, coin-operated telephones, and known data only lines in separate area code. Clearly, service-specific and technology-specific overlays could be used to extend the lives of the area codes. Such overlays if properly applied could even increase the ease of number identification for end use customers.

## CONCLUSION

Ohio's numbering problems are escalating. The existing mechanisms for coping with such problems are clearly inadequate. Due to its current area code situation, it is imperative that Ohio be given the necessary tools immediately. Therefore, the PUCO respectfully requests that the FCC grant this Petition for Additional Authority pertaining to number conservation measures so that the PUCO can ensure more efficient number resource utilization and thereby protect Ohio telecommunications consumers and companies from the ordeal and expense of repeated area code relief measures. Further, through the exercise of the additional authority Ohio can more effectively participate in the ongoing efforts to preserve the dwindling national resources of area codes and telephone numbers.

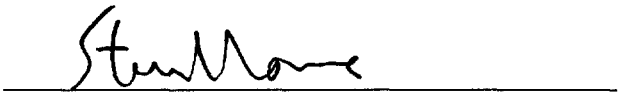
The Public Utilities Commission of Ohio would like to thank the FCC for its prompt and careful consideration of this petition.

Respectfully submitted,

**Robert A. Abrams**
**Jodi J. Bair**
Assistant Attorneys General
Public Utilities Section
180 E. Broad St., 7th Floor
Columbus, OH 43215
(614) 466-4395
Fax: (614) 644-8764

# CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **REPLY MEMORANDUM** submitted on behalf of the Staff of the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 14th day of October, 1999.



**Steven T. Nourse**
Assistant Attorney General

**PARTIES OF RECORD:**

William Kennard
Chairman
Federal Communications Commission
445 12th St., S.W.
Room 8-B201
Washington, DC 20554

Harold W. Furchtgott-Roth
Commissioner
Federal Communications Commission
445 12th St., S.W.
Room 8-A302
Washington, DC 20554

Susan Ness
Commissioner
Federal Communications Commission
445 12th St., S.W.
Room 8-B115
Washington, DC 20554

Michael Powell
Commissioner
Federal Communications Commission
445 12th St., S.W.
Room 8-A204
Washington, DC 20554

Gloria Tristani
Commissioner
Federal Communications Commission
445 12th St., S.W.
Room 8-C302
Washington, DC 20554

Robert Calaff, legal Advisor
Office of Cmsnr. Furchtgott-Roth
Federal Communications Commission
The Portals 8-A302
445 12th St., S.W.
Washington, DC 20554

Dan Connors, Legal Advisor
Office of Cmsnr. Ness
Federal Communications Commission
The Portals 8-B115D
445 12th St., S.W.
Washington, DC 20554

Ari Fitzgerald, Legal Advisor
Office of Chairman Kennard
Federal Communications Commission
The Portals 8-B201N
445 12th St., S.W.
Washington, DC 20554

Peter Tenhula, Snr. Legal Advisor
Office of Cmsnr. Powell
Federal Communications Commission
The Portals 8-A204C
445 12th St., S.W.
Washington, DC 20554

Adam Krinsky, Legal Advisor
Office of Cmsnr. Tristani
Federal Communications Commission
The Portals 8-C302F
445 12th St., S.W.
Washington, DC 20554

Lawrence E. Strickling, Chief
Common Carrier Bureau
Federal Communications Commission
445 12th St., S.W.
Room 5-B303
Washington, DC 20554

Thomas J. Sugrue, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., S.W.
Room 3-C252
Washington, DC 20554

James D. Schlichting, Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., S.W.
Room 3-C254
Washington, DC 20554

Kris Monteith, Chief
Wireless Telecommunications Bureau
Policy Division
Federal Communications Commission
445 12th St., S.W.
Room 3-C124
Washington, DC 20554

Joseph A. Levin
Wireless Telecommunications Bureau
Policy Division
Federal Communications Commission
445 12th St., S.W.
Room 3-B135
Washington, DC 20554

David Siehl
Wireless Telecommunications Bureau
Policy Division
Federal Communications Commission
445 12th St., S.W.
Room 3-A164
Washington, DC 20554

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

ITS
1231 20th Street, N.W.
Washington, DC 20036

Howard J. Symons
Sara F. Seidman
Casey B. Anderson
Mintz, Levin, et al.
701 Pennsylvania Ave. N.W.
Suite 900
Washington, DC 20004

Mark C. Rosenblum
AT&T Corp.
295 North Maple Ave.
Room 3245H1
Basking Ridge, NJ 07920

Douglas I. Brandon
AT&T Wireless Services, Inc.
1150 Connesticut Ave. N.W.
4th Floor
Washington, DC 20036

Mary McDermott
Snr. V. P. & Chief of Staff
Government Relations
Mary Madigan Jones
V. P. External Affairs
Personal Communications Industry Assn.
500 Montgomery St., Suite 700
Alexandria, VA 22314

Leonard J. Kennedy
Laura H. Phillips
Laura S. Roecklein
Dow Lohnes & Albertson
1200 New Hampshire N.W.
Suite 800
Washington, DC 20036

M. F. Altschul
Randal S. Coleman
1250 Connecticut Avenue, N.W.
Suite 800
Washington, DC 20036

Raidza Wick
Pamela Arluk
2650 Park Tower Drive
4th Floor
Vienna, VA 22180

Helen M. Mickiewicz
505 Van Ness Ave.
San Francisco, CA 94102

John F. Raposa
GTE Service Corporation
600 Hidden Ridge
HQE03J27
Irving, TX 75038

Andre J. Lachance
GTE Service Corporation
1850 M Street, N.W.
Suite 1200
Washington, DC 20036